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7 UNITED STATES DISTRICT COURT  
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10 LARRY SMITH, Case No. 3:15-cv-00034-MMD-VPC  
11 v. Petitioner, ORDER  
12 JAMES COX, et al.,  
13 Respondents.  
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15 This *pro se* habeas matter under 28 U.S.C. § 2254 comes before the Court on  
16 respondents' motion to dismiss petitioner Larry Smith's petition (dkt. no. 13). Smith  
17 opposed (dkt. no. 20), and respondents replied (dkt. no. 21).

18 **I. PROCEDURAL HISTORY AND BACKGROUND**

19 On April 10, 2007, a jury convicted Smith of lewdness with a child under fourteen  
20 years of age. (Exhibit 18 to motion to dismiss, dkt. no. 13.)<sup>1</sup> The state district court  
21 sentenced Smith to life with the possibility of parole after ten years. (Exh. 22.) The  
22 judgment of conviction was filed on May 30, 2007. (Exh. 21.)

23 The Nevada Supreme Court affirmed the conviction on April 10, 2008, and  
24 remittitur issued on May 6, 2008. (Exhs. 41, 46.) The Nevada Supreme Court affirmed  
25 the state district court's dismissal of Smith's state postconviction petition on January 16,  
26 2014, and remittitur issued on February 10, 2014. (Exhs. 87, 88.)

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<sup>1</sup>Exhibits referenced in this order are exhibits to respondents' motion to dismiss,  
dkt. no. 13, and are found at dkt. nos. 13-17.

1       Smith dispatched his federal petition for mailing on or about January 12, 2015.  
2 (Dkt. no. 5.) Respondents now argue that several grounds in the petition should be  
3 dismissed as unexhausted or procedurally barred. (Dkt. no. 13.)

4 **II.    LEGAL STANDARDS**

5       28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty  
6 Act (AEDPA), provides that this court may grant habeas relief if the relevant state court  
7 decision was either: (1) contrary to clearly established federal law, as determined by the  
8 Supreme Court; or (2) involved an unreasonable application of clearly established  
9 federal law as determined by the Supreme Court.

10      **A.    Exhaustion**

11       A federal court will not grant a state prisoner's petition for habeas relief until the  
12 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*  
13 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state  
14 courts a fair opportunity to act on each of his claims before he presents those claims in  
15 a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also  
16 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the  
17 petitioner has given the highest available state court the opportunity to consider the  
18 claim through direct appeal or state collateral review proceedings. See *Casey v. Moore*,  
19 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir.  
20 1981).

21       A habeas petitioner must "present the state courts with the same claim he urges  
22 upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal  
23 constitutional implications of a claim, not just issues of state law, must have been raised  
24 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D.  
25 Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court  
26 must be "alerted to the fact that the prisoner [is] asserting claims under the United  
27 States Constitution" and given the opportunity to correct alleged violations of the  
28 prisoner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see *Hiivala v.*

1 *Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b)  
 2 “provides a simple and clear instruction to potential litigants: before you bring any claims  
 3 to federal court, be sure that you first have taken each one to state court.” *Jiminez v.*  
 4 *Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S. at 520).  
 5 “[G]eneral appeals to broad constitutional principles, such as due process, equal  
 6 protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Hiivala*,  
 7 195 F.3d at 1106 (citations omitted). However, citation to state caselaw that applies  
 8 federal constitutional principles will suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158  
 9 (9th Cir. 2003) (en banc).

10 A claim is not exhausted unless the petitioner has presented to the state court  
 11 the same operative facts and legal theory upon which his federal habeas claim is based.  
 12 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The  
 13 exhaustion requirement is not met when the petitioner presents to the federal court facts  
 14 or evidence which place the claim in a significantly different posture than it was in the  
 15 state courts, or where different facts are presented at the federal level to support the  
 16 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*  
 17 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,  
 18 458 (D. Nev. 1984).

19 Finally, a claim is exhausted only when it is presented in a way that provides the  
 20 state courts with an opportunity to rule on its merits. See *Castille v. Peoples*, 489 U.S.  
 21 346, 351 (1989) (holding that exhaustion cannot be achieved by procedurally deficient  
 22 or improper means); *McQuoun v. McCartney*, 795 F.2d 807, 809 (9th Cir. 1986).

23 **B. Procedural Default**

24 “Procedural default” refers to the situation where a petitioner in fact presented a  
 25 claim to the state courts but the state courts disposed of the claim on procedural  
 26 grounds, instead of on the merits. A federal court will not review a claim for habeas  
 27 corpus relief if the decision of the state court regarding that claim rested on a state law  
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1 ground that is independent of the federal question and adequate to support the  
 2 judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

3 The *Coleman* Court explained the effect of a procedural default:

4 In all cases in which a state prisoner has defaulted his federal  
 5 claims in state court pursuant to an independent and adequate state  
 6 procedural rule, federal habeas review of the claims is barred unless the  
 7 prisoner can demonstrate cause for the default and actual prejudice as a  
 8 result of the alleged violation of federal law, or demonstrate that failure to  
 9 consider the claims will result in a fundamental miscarriage of justice.  
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11 *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The  
 12 procedural default doctrine ensures that the state's interest in correcting its own  
 13 mistakes is respected in all federal habeas cases. See *Koerner v. Grigas*, 328 F.3d  
 14 1039, 1046 (9th Cir. 2003).

15 To demonstrate cause for a procedural default, the petitioner must be able to  
 16 "show that some objective factor external to the defense impeded" his efforts to comply  
 17 with the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to  
 18 exist, the external impediment must have prevented the petitioner from raising the  
 19 claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

20 **III. INSTANT PETITION**

21 **A. Grounds 1(d), 1(e), and 10**

22 Grounds 1(d) and 1(e) both allege ineffective assistance of counsel in violation of  
 23 Smith's Sixth and Fourteenth Amendment rights. In ground 1(d), Smith claims that his  
 24 trial counsel was ineffective for failing to ensure that the state district court gave him  
 25 notice of the sex offender registration requirements prior to sentencing, and in ground  
 26 1(e), Smith contends that appellate counsel was ineffective when he refused to  
 27 withdraw after Smith advised him of a conflict and demanded that he withdraw (dkt. no.  
 28 5 at 3). Smith claims in ground 10 that the state district court's failure to provide notice  
 of sex offender registration violated his Fourteenth Amendment due process rights. *Id.*  
 at 34.

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1        Respondents acknowledge that Smith presented these three grounds to the  
 2 Nevada Supreme Court (dkt. no. 13 at 4-5). However, they point out that, in its order  
 3 affirming the denial of Smith's postconviction petition, the state supreme court declined  
 4 to consider these claims on their merits because Smith did not present them to the state  
 5 district court first. (Ex. 87 at 3-4.) These claims were not presented to the Nevada  
 6 Supreme Court in a procedurally proper manner that would permit them to be properly  
 7 considered on their merits, and therefore, they are unexhausted. See Ex. 55; see also  
 8 *Castille*, 489 U.S. at 351; *McQuoun*, 795 F.2d at 809. Accordingly, the Court concludes  
 9 that grounds 1(d), 1(e), and 10 are unexhausted.<sup>2</sup>

10        **B.      Ground 3**

11        Smith contends that witness Martha Smith's vouching for the victim at trial violated  
 12 his Fifth and Fourteenth Amendment rights to due process and a fair trial (dkt. no. 5 at  
 13 12-13). Respondents argue that Smith presented this claim in his direct appeal as a  
 14 matter of state law only. The Court has carefully reviewed Smith's direct appeal and the  
 15 Nevada Supreme Court's order affirming his conviction. In Smith's direct appeal, he  
 16 argues that the denial of a mistrial based on Martha Smith's improper testimony was not  
 17 harmless error. (Exh. 34 at 10-13.) While he makes brief reference to a "fair trial," he  
 18 relies on state caselaw, which in turn also rests on state law. This is insufficient to raise  
 19 a claim of federal constitutional error.<sup>3</sup> *Hiivala*, 195 F.3d at 1106; *Peterson*, 319 F.3d at  
 20 1158. Accordingly, federal ground 3 is unexhausted.

21        **C.      Grounds 1(c) and 6**

22        In ground 1(c), Smith asserts that he and his trial counsel had a conflict of  
 23 interest (dkt. no. 5 at 3-4). In ground 6, he contends that the trial court violated his Fifth,  
 24 Sixth and Fourteenth Amendment rights when it denied his request for substitute

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25        <sup>2</sup>In their reply in support of the motion to dismiss, respondents abandoned their  
 26 contention that grounds 8 and 9 were unexhausted (dkt. no. 21 at 4).

27        <sup>3</sup>The Court notes, by way of comparison, that Smith asserted other claims in his  
 28 direct appeal that rested explicitly on the Fourteenth Amendment's due process  
 protections. See Exh. 34, at 7-10, 14-21.

1 counsel. *Id.* at 22-24. In affirming the denial of the state petition, the Nevada Supreme  
2 Court concluded that Smith's claims based on an alleged conflict of interest were  
3 waived because Smith failed to raise them on direct appeal. (Exh. 87 at 3.)

4 Under Nevada law, the state district court shall dismiss a state postconviction  
5 claim that could have been raised in a direct appeal or a prior postconviction petition.  
6 NRS § 34.810(1)(b). Petitioner bears the burden of proving good cause for his failure to  
7 present the claim and of proving actual prejudice. NRS § 34.810(3). The Nevada  
8 Supreme Court explicitly relied on this procedural bar when it declined to review the  
9 claims that correspond to federal grounds 1(c) and 6. (Exh. 87 at 3.) The Ninth Circuit  
10 Court of Appeals has held that, at least in non-capital cases, application of the  
11 procedural bar at issue in this case — NRS § 34.810 — is an independent and  
12 adequate state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003); see  
13 also *Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9th Cir. 1999).

14 Therefore, this Court finds that the Nevada Supreme Court's determination that  
15 federal grounds 1(c) and 6 are procedurally barred under NRS § 34.810(1)(b) was an  
16 independent and adequate ground for the Court's dismissal of those claims in the state  
17 petition. In his opposition to the motion to dismiss, Smith makes a bare assertion that  
18 ineffective assistance of counsel provides good cause for him to overcome the  
19 procedural bar (dkt. no. 20 at 2). But “[c]ause for a procedural default on appeal  
20 ordinarily requires a showing of some external impediment preventing counsel from  
21 constructing or raising the claim.” *Murray*, 477 U.S. at 492. The Court concludes that  
22 Smith's naked claim of ineffective assistance of counsel fails to demonstrate cause for  
23 the procedural default. Accordingly, grounds 1(c) and 6 are dismissed as procedurally  
24 barred.

25 **D. Ground 7**

26 Finally, in ground 7, Smith contends that the state district court abused its  
27 discretion in denying his state postconviction petition, in violation of his Fifth, Sixth and  
28 Fourteenth Amendment rights (dkt. no. 5 at 26-27). The Court agrees with respondents

1 that a “blanket claim” that the state district court abused its discretion in dismissing his  
 2 petition fails to state a claim for relief under AEDPA or is duplicative of the other federal  
 3 grounds (dkt. no. 13 at 7) (28 U.S.C. § 2254(d) provides that this Court may grant  
 4 habeas relief if the relevant state court decision was either: (1) contrary to clearly  
 5 established federal law, as determined by the Supreme Court; or (2) involved an  
 6 unreasonable application of clearly established federal law as determined by the  
 7 Supreme Court). Ground 7, therefore, is dismissed.

#### 8 **IV. PETITIONER’S OPTIONS REGARDING UNEXHAUSTED CLAIMS**

9 A federal court may not entertain a habeas petition unless the petitioner has  
 10 exhausted available and adequate state court remedies with respect to all claims in the  
 11 petition. *Rose*, 455 U.S. at 510. A “mixed” petition containing both exhausted and  
 12 unexhausted claims is subject to dismissal. *Id.* In the instant case, the Court finds that  
 13 (a) ground 7 is dismissed for failure to state a claim cognizable in federal habeas  
 14 corpus; (b) grounds 1(c) and 6 are procedurally barred; and (c) grounds 1(d), 1(e), 3,  
 15 and 10 are unexhausted. Because the Court finds that the petition is a “mixed petition,”  
 16 containing both exhausted and unexhausted claims, petitioner has these options:

17 1. He may submit a sworn declaration voluntarily abandoning  
 18 the unexhausted claims in his federal habeas petition, and proceed only  
 19 on the exhausted claim;

20 2. He may return to state court to exhaust his unexhausted  
 21 claims, in which case his federal habeas petition will be denied without  
 22 prejudice; or

23 3. He may file a motion asking this court to stay and abey his  
 24 exhausted federal habeas claims while he returns to state court to exhaust  
 25 his unexhausted claims.

26 With respect to the third option, a district court has discretion to stay a petition  
 27 that it may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276, (2005).  
 28 The *Rhines* Court stated:

29 [S]tay and abeyance should be available only in limited circumstances.  
 30 Because granting a stay effectively excuses a petitioner’s failure to  
 31 present his claims first to the state courts, stay and abeyance is only  
 32 appropriate when the district court determines there was good cause for  
 33 the petitioner’s failure to exhaust his claims first in state court. Moreover,

1 even if a petitioner had good cause for that failure, the district court would  
2 abuse its discretion if it were to grant him a stay when his unexhausted  
3 claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application  
4 for a writ of habeas corpus may be denied on the merits, notwithstanding  
the failure of the applicant to exhaust the remedies available in the courts  
of the State").

5 *Rhines*, 544 U.S. at 277.

6 Accordingly, if petitioner files a motion for stay and abeyance, he would be  
7 required to show good cause for his failure to exhaust his unexhausted claims in state  
8 court, and to present argument regarding the question whether or not his unexhausted  
9 claims are plainly meritless. Respondent would then be granted an opportunity to  
10 respond, and petitioner to reply.

11 Petitioner's failure to choose any of the three options listed above, or seek other  
12 appropriate relief from this Court, will result in his federal habeas petition being  
13 dismissed. Petitioner is advised to familiarize himself with the limitations periods for  
14 filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations  
15 periods may have a direct and substantial effect on whatever choice he makes  
16 regarding his petition.

17 **V. CONCLUSION**

18 It is therefore ordered that respondents' motion to dismiss (dkt. no. 13) is granted  
19 as follows:

20 The following grounds are dismissed as set forth in this order: grounds 1(c), 6  
21 and 7.

22 The following grounds are unexhausted: grounds 1(d), 1(e), 3, and 10.

23 It is further ordered that petitioner will have thirty (30) days to either: (1) inform  
24 this Court in a sworn declaration that he wishes to formally and forever abandon the  
25 unexhausted grounds for relief in his federal habeas petition and proceed on the  
26 exhausted grounds; or (2) inform this Court in a sworn declaration that he wishes to  
27 dismiss this petition without prejudice in order to return to state court to exhaust his  
28 unexhausted claims; or (3) file a motion for a stay and abeyance, asking this Court to

1 hold his exhausted claims in abeyance while he returns to state court to exhaust his  
2 unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance, or  
3 seek other appropriate relief, respondents may respond to such motion as provided in  
4 Local Rule 7-2.

5 It is further ordered that if petitioner elects to abandon his unexhausted grounds,  
6 respondents will have thirty (30) days from the date petitioner serves his declaration of  
7 abandonment in which to file an answer to petitioner's remaining grounds for relief. The  
8 answer must contain all substantive and procedural arguments as to all surviving  
9 grounds of the petition, and must comply with Rule 5 of the Rules Governing  
10 Proceedings in the United States District Courts under 28 U.S.C. §2254.

11 It is further ordered that petitioner will have thirty (30) days following service of  
12 respondents' answer in which to file a reply.

13 It is further ordered that if petitioner fails to respond to this order within the time  
14 permitted, this case may be dismissed.

15 DATED THIS 26<sup>th</sup> day of February 2016.  
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18 MIRANDA M. DU  
19 UNITED STATES DISTRICT JUDGE  
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